No. 86-323

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

CHOKWE LUMUMBA,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Federal Rule of Criminal Procedure 42 sets forth the procedure by which criminal contempts are prosecuted in the Federal Courts pursuant to 18 U.S.C. Section 401. The following question concerning the constitutionality of the above Procedural Rule is presented here for review.

(1) Does the lack of uniformity in procedures employed under Rule 42 to destroy the clarity and predictability of the Rule as to erode individuals substantive Constitutional Protections.

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OPINIONS BELOW

The summary contempt conviction of Petitioner, Chokwe Lumumba, Esq., was reversed and remanded by the United States Court of Appeals, Second Circuit, in United States v. Lumumba, _F2d_ (2d Cir, 1984), said opinion attached hereto as Appendix A. The subsequent contempt conviction of Petitioner on rehearing was affirmed by the United States Court of Appeals in United States v. Lumumba, _F2d_, (2d Cir, 1986), said opinion attached hereto as Appendix B.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals, affirming Petitioner's conviction, was issued on June 27, 1986. The jurisdiction of this Honorable Court is invoked pursuant to 28 USC Section 1254.

Constitutional Provisions, Statutes and Rules Involved

The Fifth Amendment to the United States Constitution provides, in pertinent part, that:

> No person shall ... be deprived of life, liberty, or property, without due process of law ...

The Sixth Amendment to the United States Constitution provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the United State Constitution provides, in relevant part, that:

> No state shall make an enforceary law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 401 of Title 18 of the United States Codes provides that

> The Court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none others, as -
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
> (2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 32(a)(1) of the Federal Rules of Criminal Procedures provides, in relevant part, that:

Sentence shall be imposed without unreasonable delay. Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment. The attorney for the government shall have an equivalent opportunity to speak to the court.

Rule 42 of the Federal Rules of Criminal Procedure provides that:

A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct

constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

Rule 902 of the Federal Rules of Evidence provides, in relevant part, that:

(2) Domestic public documents not under seal. - A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(4) Certified copies of public records. - A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by

> the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

Rule 1005 of the Federal Rules of Evidence provides that:

> The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

STATEMENT OF FACTS

On September 6, 1983, after the conclusion of a highly publicized, complex and five (5)-month criminal trial, the Honorable Kevin J. Duffy, United States District Judge of the Southern District of New York, summarily found one of 5 defense attorneys, Petitioner, Chokwe Lumumba, Esq., in criminal contempt of court. The Order was entered pursuant to 42(a) of the Federal Rules of Criminal Procedure, (FRCP) and Title 18 U.S.C. Section 401, and cited in general fashion two specifications of conduct which Judge Duffy felt justified use of the court's summary contempt power.

The citations for contempt were subsequently assigned to the Honorable Robert N. Sweet, District Court Judge,

for sentencing only. Petitioner appealed the conviction to the Second Circuit Court of Appeals. The Court of Appeals reversed and remanded to Judge Sweet, for proceedings consistant with its opinion. See Appendix A.

The citations for contempt arose during the trial of U.S.A. v. Shakur, et al, 82 Cr. 312 ("The Brinks case"). Petitioner successfully defended his client, Bilal Sunni-Ali.

The first contempt citation arose during jury voir dire. One venireman had just been excused for stating that certain media coverage of the Brinks case would probably affect her ability to be impartial and unbiased towards the defendants. (Brinks, Tr. 922-28) (Tr. 116-21). The article this juror had read spoke of danger to the prospective jury

in the Brinks trial. (Tr. 117). It was when Petitioner vigorously attempted to question the jurorover Trial Judge Duffy's order to cease that the Judge held Petitioner in criminal contempt.

At the contempt proceedings following the Court of Appeals remand, Petitioner testified that the reason for his unrelenting advocacy was due to his belief that failure to resolve the issue of the jury's exposure to prejudicial media coverage could result in a partial, biased jury and ultimately, improper conviction for his client.

The second contempt citation arose outside the presence of the jury months later. The Judge directed Petitioner to make an offer of proof with respect to cross-examination of a government

witness. Upon concluding his offer of proof, Petitioner said, "Another point is I would like some kind of ruling on why you won't let me do what you let them do and then have the audacity to sit on the bench and claim you are fair". (Brinks). Judge Duffy immediately cited Petitioner for contempt again. (Brinks). Petitioner testified at the contempt proceedings ordered by the Court of Appeals remand that his comment on fairness was a good faith attempt to get the judge to correct what, in the mind of Petitioner, was a blatant display of bias and partiality.

The exchanges between Petitioner and Judge Duffy during the Brinks trial often became heated and resulted in numerous personality conflicts. For example, Petitioner accused the Judge of being a

racist (Brinks, Tr. 2284), that the Judge acted unfairly towards the defense (Brinks, Tr. 2646-49) and accused the Judge of being hypocritical (Brinks, Tr. 4774). For his part, the Judge referred to Appellant as the "village idiot" (Brinks, Tr. 2381), and when asked on what basis certain objections were sustained, told Appellant to "look it up in the books". (Brinks, Tr. 2281).

Petitioner was convicted by Judge Sweet on both contempt citations and once again sentenced to three (3) years probation and three hundred fifty (350) hours of community service on each specification of contempt, to run concurrently.

Petitioner's conviction was affirmed by the United States Court of Appeals for the Second Circuit on June 27, 1986.

Accordingly, Petitioner now asks this Honorable Court to issue a Writ of Certiorari to said Second Circuit Court of Appeals in order to review the pertinent issues in United States v. Lumumba.

REASONS FOR GRANTING THE WRIT

I. THE SUPREME COURT'S RECENT DEPARTURE IN TAYLOR V. HAYES FROM THE TREND TOWARD PROCEDURAL REGULARITY HAS RESULTED IN THE DISSIPATION OF DEFENDANTS' CONSTITUTIONAL PROTECTIONS IN CRIMINAL CONTEMPT CASES.

Even prior to the enactment of the Criminal Contempt statute, this court in Cooke v. United States, 267 U.S. 517 (1925) set forth the ideal components of Due Process in criminal contempt cases, where the alleged contempt was not committed in open court:

> Due Process of Law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the chargers and a reasonable opportunity to meet them by way of defense or explanation, we think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed id., at 537.

Since Cooke, this court has welcomed the challenge of identifying the vital ingredients of Due Process afforded contemnorswho did their wrong in open court. A policy toward balancing an alleged contemnors' constitutional procedural protections against the courts' need to preserve its authority has allowed, if not encouraged, this court to provide less than full procedural protection to the alleged open court contemnor. Such "less than full" procedural protection has been doled out in varying amounts. It is the varying amount and lack of predictability in procedural protection available to the open court contemnor that is troublesome and brings this matter here today.

We submit that since Cooke, this court has earnestly attempted to

delineate the exact procedural protection available to the many variations of an open court contemnor. In In Re Oliver, 333 U.S. 257 (1948), Justice Black, writing for the court, extended all procedural protection but the right to trial by jury to criminal contempt cases. Though the contempt took place before a one man Grand Jury and thus was not considered the "open court" exception referred to in Cooke, supra, the Oliver court did explain that the contemnor is entitled to notice of the specific charges, an opportunity to prepare a defense, to obtain counsel, to cross examine his accusers, and to offer evidence.

Later in Harris v. United States, 382 U.S. 162 (1963) another Grand Jury case, this court reaffirmed its definition of the procedural protection

available to contempt Defendants. There, the necessary procedural protection was again eguated with Justice Tafts' remarks in Cooke as reprinted above. Continuing the evolution of the constitutionally correct procedures to be afforded in Contempt cases, this court in Bloom v. Illinois, 391 U.S. 194 (1968), announced that "In modern times, procedures in criminal contempt cases have come to mirror those used in ordinary criminal cases." id., at 107. Nonetheless, in Bloom, this court still had not encountered that open court exception mentioned in Cooke.

Then, in Mayberry v. Pennsylvania, 400 U.S. 455 (1971), this court determined that in certain circumstances, the right to a public trial before an impartial judge. That the public trial

referred to in Mayberry is like a Fed.R.Crim.P. 42(b) proceeding goes without saying. Though a state court case, Mayberry was decided on the same due process grounds that govern Rule 42(b) proceedings in the federal courts. Though, this court had just held that "Rule 42(b) prescribes the 'procedural regularity' for all contempts in the Federal Regime ... except those unusual situations envisioned by Rule 42(a) where instant action is necessary to protect the judicial institution itself," id., at 167, until Mayberry, such clear and definite procedural regularity had not been bestowed upon open court contemnors.

So, just about the time when all open court contemnors had settled into a belief that they would have the benefit

of customary procedural safeguards, this Court in Taylor v. Hayes, 418 U.S. 488 (1974) indicated that they would not. The Taylor Court explained that because the court saw the conduct with its own eyes, a full ventilation of the facts would be unnecessary. Nevertheless, by not carving out an exception for those contempts, the context of which demands a full ventilation of the facts, and by not categorizing the many different types of contempts, the Taylor court apparently forgot the admonition in Bloom v. Illinois, supra, that "the potential for abuse in exercising the summary power to imprison for contempt - it is an 'arbitrary power' which is 'liable to abuse'" id., at 202; "[I]ts exercise is a delicate one and care is needed to avoid arbitrary or aggressive conclusions"

Cooke v. United States, 267 U.S. 517, 539 (1925); and, "that contempt power over counsel, summary or otherwise, is capable of abuse is certain. Men who make their way to the bench sometimes exhibit vanity, irascibility, narrowness, arrogance, and other weaknesses to which human flesh is heir" Sacher v. United States, 343 U.S. 1, 12 (1952)

We submit that because of the rule in Mayberry and the close quarters within which the court and the contemnor must operate, Taylor represents a departure from the trend toward normalizing the procedural protections available in contempt cases. A determination of the precise scope of proceedings which are less than a "full scale trial", but which are still fair is to be made by some of the same vain, irascible, narrow and

arrogant judges who couldn't meet out contempt punishment properly in the first place. The following is a brief illustration of the many cases which have been decided since Taylor using the subjective slide rule approach toward determining constitutionally sound procedures in contempt cases.

A. TAYLORS' UNFORTUNATE PROGENY

To highlight the cumbersome conceptual framework within which Judges, Lawyers and Defendants must operate in search of an equilibrium of communication, a matrix has been designed and attached for your review. The Matrix is also offered as a tool so that if this court is inclined, it may restructure the various criminal contempts in a manner

designed to achieve simplicity and predictability.

In the Matrix, criminal contempt committed in the actual presence of the court has been divided into the four most common scenarios. Also, the procedures debated back and forth as being sufficient stuff to guarantee due process have been divided into the five most common types. The Grid matrix is annexed hereto in Appendix C and by this reference made a part of the body of this petition.

PART 1 consists of those contempts committed in the actual presence of the court where the judge has not become embroiled in the controversy and has acted immediately to adjudicate and sentence. Though such contempts have

traditionally been prosecuted under Fed. R. Crim. P. 42(a) in summary fashion, the 5th Circuit in United States v. Brannon, 546 F 2d 1242 (5th Cir. 1977), via dictum has intimated that a summarily convicted contemnor should always be afforded at least the right to allocution. See: Fed. R. Crim. P. 32(a)(1). Apparently the court in Brannon relied in its opinion upon the recommendation of the American Bar Association. See: ABA project on Standards For Criminal Justice, the Function of the Trial Judge at P. 6-53 (2d ed. 1980). Similarly, the seventh circuit in United States v. Lowery, 733 Fed. 441 (7th Cir. 1984), and the Second Circuit in United States v. Martin-Trigona, 759 F.2d 1017 (2d Cir. 1985) now allow a right of allocution as some

procedural protection in the formerly bare boned no holds barred rule 42(a) summary proceedings. In Martin-Trigona, the court indicated that such right of allocution was proper, but refused to reverse only because the contemnor never asked for an opportunity to explain his actions. The contempts of Part 1 are muddied even more in light of the ninth circuits opinion in United States v. Larry Flynt, 756 F2d 1352 (9th Cir. 1985), where the court allowed a full evidentiary hearing where there was some indication that the contemnor might not be of sound mind.

PART II consists of the class of contempts committed in the actual presence of the court where the judge has not become embroiled in a running

controversy with the contemnor, but because of the lack of necessity, has delayed adjudication until the end of the underlying proceedings. Dictum in the Second Circuits opinion in United States v. Stratton, 779 F.2d 820 (2d Cir. 1985) indicates that absent the type of necessity to vindicate the authority of the court, all contempts committed in the courts' presence must be prosecuted pursuant to Fed. R. Crim. P. 42(b). In connection with the proper Rule 42(b) procedures, the court stated:

> If summary contempt as provided in Rule 42(a) is improper, contempt can be punished only pursuant to Rule 42(b), which incorporates full due process protections. id., at 835 (emphasis added)

Such a ruling is certainly at odds with the Second Circuits ruling in United

States v. Lumumba, 741 F2d 12 (2d Cir. 1984) in which a Rule 42(b) hearing was mandated, but which was to consist not of full due process protections but merely elementary due process . See: Taylor v. Hayes, supra.

Additionally, a District Court of the Sixth Circuit in Ahmed v. Reiss S.S. Co., 580 F. Supp. 737, (N.D. Ohio 1984), provided a hearing at which the alleged contemnor was given full opportunity to present evidence and testimony before the same charging judge in connection with this class of contempts. By contrast, the Supreme Court of North Carolina in O'Briant v. O'Briant, 329 SE 2d. 370 (N.C. 1985), following the constitutional principles of Taylor v. Hayes, supra allowed a similar type hearing as that in Reiss, but before a newly assigned Judge.

Finally, a full hearing was allowed before the same judge by the Seventh Circuit in United States v. Moschiano, 695 F2d 236 (7th Cir. 1982).

PART III consists of the class of contempts committed in the actual presence of the court which have been adjudicated immediately and where the court has become embroiled in a running controversy with the contemnor. When faced with this type of contempt, the Eleventh Circuit in Sandstrom v. Butterworth, 738 F2d 1200 (11th Cir. 1984), explained that because of the direct and personal embroilment of the trial judge in a controversy with the contemnor, even the need for immediate sanction was outweighed by the contemnors constitutional right to be heard before a

fair and impartial tribunal. That circuit then mandated a trial before a new judge as the type of proceeding available to the contemnor. It is unclear from the Eleventh Circuits opinion whether the hearing included witnesses or merely a right of allocution.

By sharp contrast the Fifth Circuit in Farmer v. Strickland, 652 F2d 427 (5th Cir. 1981), and the Third Circuit in Commonwealth of Pennsylvania v. Local Union 542, International Union of Operating Engineers, 552 F2d. 498 (3d Cir. 1977) paved the way for the contemnor to receive no more than summary proceedings before the same judge in connection with this class of contempts. In fact, these circuits determined that despite the involvement by the court in

the running controversy with the contemnor, "the trial judge exhibited remarkable patience and restraint ... despite disrespectful and sarcastic comments by the attorney" in Farmer, and "did not engage in wrangling or bickering" in Commonwealth of Pennsylvania.

Further, that all courtroom confrontations do not rise to the level of embroilment - a sharp contrast to this courts holding in Mayberry v. Pennsylvania, supra., is evidenced by several State Supreme Court decisions based upon Constitutional principles. Naunchek v. Naunchek, 463 A. 2d 603 (Conn. 1983); State v. Campbell, 497 A. 2d 467 (Me. 1985). However, it must not be forgotten that in Mayberry, this court did not find that the trial judge had

been an "activist seeking Combat", but that because he was continually subject to vulgar and degrading epitaphs that he was so vilified ... he had necessarily became embroiled in a running, bitter controversy.

PART IV consists of the class of contempts committed in the actual presence of the court, where adjudication has been delayed until the end of the underlying proceedings, and in which the trial judge became embroiled in a running controversy with the contemnor. Dictum of the Second Circuit in United States v. Martin-Trigona, supra, indicates that for this class of contempts, "the desirable procedure is to cite the individual for contempt and refer the contempt charge to another judge for hearing after giving

appropriate notice and an opportunity to be heard, particularly if the trial judge has became personally embroiled with the contemnor" (citations omitted) id., at 1025. Additionally, Dictum in the Second Circuit in United States v. Stratton, supra, promises full due process protections for this type of contempt. id., at 835. Nonetheless when the second circuit was confronted with all the practical niceties of a real live confrontation, in United States v. Lumumba, 741 F2d. 12 (2d Cir. 1984) and United States v. Lumumba, Fed Dkt. No. 85-1106 June 27, 1986 (2d Cir. 1986), the court summarily rejected Lumumba's contention thathe had the right to call witnesses on the issue of contempt. In Lumumba because of the confusion concerning the proceedings, trial

preparation was greatly affected. Counsel did not know who would or would not be called as witnesses; who they could call in behalf of Lumumba; no pre trial discovery took place; and even the burdens of proof and persuasion were at issue. Uncertainty as to the foregoing is the result of a lack of clarity regarding the procedures and makes it well-nigh impossible to defend a case. Consequently, the court spoke rather loudly about conducting the hearing within constitutional norms, but walked very softly when asked to stare the stuff that due process is made of square in the eyes. To be sure, despite its colorful and righteous dictum, the second circuit affirmed a hearing in Lumumba which was, in fact, no more than a right of allocution and character briefing session.

Moreover, the irony created by this confusion among the circuits and the state courts can be illustrated in the following way. The second circuits' decision in Lumumba, supra is now being cited together with Taylor v. Hayes, supra in support of the vague "elementary Due Process" approach now being widely used or rather abused. The irony is that Lumumba is being cited and followed as if the court was clear and definitive in its evaluation of the nature of the proceedings sufficient to pass constitutional muster. The truth is, however, that the second circuit, like the attorneys and alleged contemnor in Lumumba were absolutely dumbfounded in determining the appropriate proceedings after the remand mandated by the United States v. Lumumba, 741 F2d. 12.

At the Annual Judicial Conference Second Judicial Circuit of the United States held September 13, 1984, the Honorable District Judge Robert W. Sweet made the following comments in connection with the Court's rule after remand of United States v. Lumumba

> Another area of leadership which we need the Circuit to provide is clarity of result. Remand questions are sometimes troublesome and confusing. I give you an example.
>
> I sentenced an attorney in the Brinks trial after he had been found contemptuous by the trial judge, a finding I felt binding upon me. Indeed, how could it be otherwise? For one thing, I know I have no appellate jurisdiction over any other district court judges. I held two days of hearings to consider the contemnor's contentions that he was entitled to a reversal of the trial judge's finding, a jury trial under Rule 42(b), and an act of state exemption for his conduct as well as the more conventional plea which was made on the day of sentence. I denied the relief requested and imposed a sentence.

Predictably, of course, the sentence was appealed and after appeal remanded with the following instruction: "The judgment of criminal contempt is reversed and the case remanded to the district court (Sweet, J.) for disposition upon notice and hearing, as set forth in Fed.R.Crim.P. 42(b). On remand, the district court need not hold a full-blown trial, but Lumumba should be allowed a reasonable opportunity to defend or explain his actions or present arguments in mitigation. See Taylor v. Hayes 418 U.S. [488] at 499 [94 S. Ct. 2697 at 2703, 41 L.Ed.2d 897 (1974)]. United States v. Lumumba, 741 F.2d 12, 17 (2d Cir.1984).

To be frank, I am completely at sea at the moment as to what should be done that has not been done. One wizard has suggested I seek, under Rule 18 of the Calendar Rules, to have the matter reassigned since I seem to be too stupid to know what to do.

I have a reform to propose, modest in scope, which I think may resolve these difficulties. In all honesty, it came to me from one of my more thoughtful brothers. If the district court certifies its inability to understand what it is supposed to do on remand, the hearing on remand will be conducted by a member of the panel which directed the remand.

Such a procedure would give, on rare occasions, Court of Appeals judges the opportunity to find facts freely without inhibition, relieve some of the burden on the district court and succeed in raising the consciousness of the Circuit Court for the need for clarity in its remand instructions.

When it is necessary to correct error, as it obviously is on occasion, whether factual or legal, the correction should be made with clarity and minimally, that is, without overkill. It has to be recognized that most judges were lawyers once, but that does not require that the reversal of a district court become an exercise in advocacy to convince the reader of the wisdom of the reversal at the expense of the dignity of the district judge.

II. PROCEDURAL REGULARITY IN THE USE OF THE CONTEMPT POWER IS VITAL TO THE ORDERLY ADMINISTRATION OF JUSTICE.

Our nation is an amalgamation of independent and autonomous nationals of other sovereigns who desire a common dream. That dream is rooted in independence and an understanding that a

belief or conviction can be asserted amidst its strongest opposition; that differences are to be respected and encouraged; and that a fair and righteous thing is there to help us when we are blinded by our individuality, nationalism or human frailty.

In the context of our judiciary, the fair and righteous thing is a system of courts bound together by a thin reed of humanness, discipline and a healthy respect. That reed is adjusted frequently at its point of greatest tension by, inter alia, the authority of courts to punish for contempt. Where the courts contempt power is wielded appropriately, the adjustment is smooth, equilibrium is attained, and the thing remains fair and righteous. Failure to appropriately use the contempt power, however, throws off the reed and

undermines the entire balance theretofore attained.

During the 1960's, this Great Nation endured a confrontational period in which individuals and collectives fought over sexual roles, gay rights, education, abortion, civil rights and war and peace. Because of inadequate or nonexistent input from Congress, the Judiciary was largely unable to assist in the resolution of many of the greatest fights until the 1970s. As a result, our nations people took to the streets. After the dust cleared, cities had been burned, ethnic groups had been polarized, a sexual revolution had begun, the American family structure had been eroded, we lost a war and our greatest and most inspirational leaders had been killed.

Today we again find ourselves enduring a confrontational period, we fight, maim and kill about gay rights, abortion, civil rights, terrorism, ethnic extremism, morality, education and religion. But today as our nation matures, we are equipped with well concocted legislation and a well worn judiciary. With such tools, we must cultivate the spirit of our nations people by engendering a faith in the judiciary - that it is the fair and righteous thing which backs us up - which allows us to fuss, fight, err and otherwise be human.

The only way to build such faith is to be true as we adjust the reed; to be fair as we dole out punishment for the human imperfections inherent in our judicial system; to be open to the full

tilt convictions of those advocating change and those answering our close and emotional questions. We mustn't make the same mistake again and take to the streets. We miss our leaders.

This Court, we submit, must understand its role in setting the tone for our nation's people; a tone to be bought only with principles of equity and justice. It is only when such tone has been set that the important contempt power will be used with circumspection and our court system will appear to our nation to be that thing of fairness and righteousness.

II ACCEPTING JURISDICTION FOR THIS CASE APPEAL WILL AFFORD THIS COURT AN OPPORTUNITY TO CLARIFY THE PROCEDURES TO BE EMPLOYED IN CRIMINAL CONTEMPT CASES

The Lumumba case is one in which every scenario depicted in our model has existed. Initially the contempt was deemed to have taken place before the court and so disrupted the proceedings that Fed.R.Crim.P. 42(a) adjudication was proper. After recusal by the trial judge, the proceeding took the form of a contempt, concerning which, there was no immediate adjudication. However, only a hearing in the nature of a right of allocution was allowed. Then, when it was determined that the trial judge became embroiled in a running controversy with Lumumba, due process was to be afforded him at an adjudicatory hearing. Again, since the required Due Process was vague and somewhere less than a full blown trial, the once reversed court was left with the task of measuring various

amounts of due process. After all measurements it became clear that all Lumumba received was a hearing in the nature of a right of allocution.

A. A SUGGESTED SOLUTION

If this court accepts jurisdiction and agrees to decide the Lumumba case it may lay to rest the well traveled confusion existing in the law of criminal contempt. The following, we submit, is another Matrix indicating the clarity of contempt procedures to be employed in connection with the various types of criminal contempts. Such clarity can be attained if this court reviews and rules in the Lumumba case. The Matrix annexed hereto in Appendix D and by this reference made a part of this Petition, is for your reference.

PART I may be adjudicated summarily before the charging judge. The contemnor will be allowed to explain his or her actions briefly in the nature of a right of allocution.

PART II may be adjudicated at the end of the underlying proceedings via full evidentiary hearing before the charging judge.

PART III an initial hearing is necessary with only the charging judge and alleged contemnor as witnesses on the issue of the embroilment of the judge. If the judge is deemed to have been embroiled in controversy with the alleged contemnor, a full evidentiary hearing will be conducted at the end of the underlying proceedings. If no embroilment is deemed

to exists, the contempt charge will be deemed to have been adjudicated and the contemnor will be allowed a hearing in the nature of a right of allocation.

PART IV may be adjudicated at the end of the underlying proceedings by a full evidentiary hearing before a newly assigned judge.

CONCLUSION

In conclusion, as we urge upon this court its role in the judicial maturity of our nation, we are reminded of this courts language in Marshall v. Jerrico, Inc. 446 U.S. 238 (1980):

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This require-

ment of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process. The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Respectfully Submitted

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CECELIA HENDERSON
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Dated: August 26, 1986

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1222—August Term, 1983

(Argued May 15, 1984 Decided July 27, 1984)

Docket No. 83-1415

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

CHOKWE LUMUMBA,

Defendant-Appellant.

Before:

CARDAMONE, PRATT and FRIEDMAN,*

Circuit Judges.

* Honorable Daniel M. Friedman, United States Circuit Judge for the Federal Circuit, sitting by designation.

Appeal from a judgment of conviction for criminal contempt entered in the United States District Court for the Southern District of New York, Kevin J. Duffy, *Judge*, pursuant to Fed. R. Crim. P. 42(a) and 18 U.S.C. § 401.

Reversed and remanded.

ANTHONY ADAMS, Detroit, Michigan (Edison, Davis & Lumumba, Detroit, Michigan, Alton Maddox, New York, New York, James W. McGinnis, Paul Curtis, Thomas Binion, Detroit, Michigan, Michael Warren, Brooklyn, New York, of counsel), *for defendant-appellant.*

STACEY J. MORITZ, Assistant United States Attorney, New York, New York (Rudolph W. Guiliani, United States Attorney for the Southern District of New York, Robert S. Litt, Assistant United States Attorney, of counsel), *for appellee.*

MARDI CRAWFORD, Detroit, Michigan, *for Michigan and National Lawyers Guild, Detroit Chapter, Amicus Curiae.*

BETTY LAWRENCE BAILEY, New York, New York, (Margaret L. Ratner, Margaret A. Burnham, of counsel), *for National Conference of Black Lawyers; Center for Constitutional Rights; National Lawyers Guild, Amici Curiae.*

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ARDAMONE, *Circuit Judge*:

This appeal is from a judgment of conviction for riminal contempt. During the course of a lengthy riminal trial a trial judge cited defendant's counsel for ontempt on two separate occasions. At the conclusion of he trial, the district court judge certified that under Fed. . Crim. P. 42(a) the conduct constituting these con-empts was committed in his presence, and then pro-eeded to hold counsel in contempt pursuant to 18 U.S.C. 401. He referred sentencing to another judge under ule 18 of the Rules of Division of Business Among outhern District Court Judges. The principal issue raised whether due process requires that a lawyer cited for riminal contempt for conduct occurring during trial ust—before being finally adjudicated in contempt at the nd of the trial—have notice and an opportunity to be eard. Since the answer to this question is "yes," and ppellant was not afforded such due process rights, the udgment of conviction appealed from must be reversed.

I

Chokwe Lumumba, an attorney, has appealed from a udgment of conviction for criminal contempt entered on eptember 6, 1983 in the United States District Court for he Southern District of New York, (Duffy, J.). Lumumba as cited by Judge Duffy for contempt for his conduct hile representing defendant Bilal Sunni-Ali during a five nonth trial against Sunni-Ali and ten co-defendants aris-ng from the October 20, 1981 armed robbery of a Brinks ruck in Rockland County, New York, during which a Brinks guard and two police officers were murdered. Lumumba also challenges the sentence imposed on him

on November 28, 1983 by United States District Court Judge Robert W. Sweet, to whom his sentencing was assigned by lot.

The first contempt citation occurred on April 13, 1983 when, midway through the voir dire selection of the jury, attorney Lumumba made his first appearance on behalf of Sunni-Ali. Lumumba immediately moved to strike the jury panel. A similar motion made by another attorney had been denied just moments earlier. Judge Duffy also denied Lumumba's motion and advised him to put it in writing. Appellant refused to heed this ruling, and persisted in his efforts to make the motion orally. The ensuing exchange precipitated numerous accusations by Lumumba against Judge Duffy. Later Lumumba interrupted questioning of a prospective juror in order to raise certain other motions. When he repeatedly refused to "be quiet and sit down," in direct defiance of a court order to do so, Judge Duffy excused the venireman and held Lumumba in criminal contempt. He made no further outbursts during the remainder of the jury selection.

The second contempt citation was issued on June 8, 1983 outside the presence of the jury. Judge Duffy had directed Lumumba to make an offer of proof with respect to his cross-examination of a government witness. Upon concluding his offer of proof, appellant remarked to the court: "Another point is I would like some kind of ruling on why you won't let me do what you let them do and then have the audacity to sit on the bench and claim you are fair." Judge Duffy responded: "Look Mr. Lumumba, you have been held in contempt more than once and you are held in contempt again."

There were several other eruptions during the trial and insults such as calling the judge an "outstanding bigot" and "a racist dog" were directed by appellant at the

bench. But the two recited instances on April 13 and June 8 were the only occasions when Lumumba was cited for contempt. On September 6, 1983, following acquittal of Bilal Sunni-Ali on all counts charged against him, Judge Duffy summarily convicted Lumumba of criminal contempt pursuant to Fed. R. Crim. P. 42(a) and 18 U.S.C. § 401. In a 36 page memorandum and order, the district court set forth the bases for the two contempt adjudications and recited numerous other examples of Lumumba's misbehavior.

The judgment for criminal contempt having been entered, sentencing came before Judge Sweet. Lumumba's attorneys filed motions seeking to have the contempt citations dismissed or, in the alternative, to have a hearing pursuant to Fed. R. Crim. P. 42(b), in order to contest whether Lumumba's conduct was contemptuous. Judge Sweet denied these motions on November 17, 1983 stating that he lacked the authority to retry the merits of the conviction or to review Judge Duffy's choice of the Rule 42(a) summary procedure. Accordingly, he proceeded to sentence Lumumba to three years probation that included 350 hours of community service to be performed during the first 15 months of that probation.

On appeal Lumumba raises four main issues: first, he claims that as the Vice President and Minister of Justice of the Provisional Government of the Republic of New Afrika, he is not subject to the jurisdiction of the United States District Courts; second, Lumumba contends that Judge Duffy erred in applying the summary contempt procedure of Rule 42(a) after waiting until the conclusion of trial to issue the contempt adjudication; third, and closely related to the previous point, is the allegation that the summary procedure deprived Lumumba of his constitutional due process right to notice and a hearing; finally,

Lumumba assails his sentence as being excessive and an abuse of discretion. We consider those arguments in order.

II

Lumumba's claim of immunity from prosecution is premised on his proclaimed status as "Vice President and Minister of Justice of the Provisional Government of the Republic of New Afrika." According to the appellant's brief, the Republic of New Afrika is the "Nation of Afrikans born in North America as a consequence of . . . slavery." It encompasses five southern states—Alabama, Georgia, Louisiana, Mississippi and South Carolina—and is an independent state. Lumumba also asserts that his defense of Bilal Sunni-Ali was undertaken under color of his position as Minister of Justice of the Republic. Since Article III, Section 2 of the United States Constitution vests in the Supreme Court original jurisdiction over "Cases affecting Ambassadors, other public Ministers and Consuls," Lumumba argues that the district court was without authority to hold him in contempt or sentence him.

The district court properly rejected Lumumba's argument and asserted its jurisdiction. As Judge Sweet observed, the Vienna Convention on Diplomatic Relations, April 18, 1961, Art. IV, 23 U.S.T. 3227, and the corresponding statute, 22 U.S.C. §§ 254a-254e, premise diplomatic immunity upon recognition by the receiving state. That is to say, neither Lumumba nor anyone else is able unilaterally to assert diplomatic immunity. Such status only exists when there is recognition of another state's sovereignty by the Department of State. In other words, recognition by the executive branch—not to be second-

guessed by the judiciary—is essential to establishing diplomatic status. *Restatement (Third) of Foreign Relations Law of the United States* § 461 Commentary at 30 (Tent. Draft No. 4, 1983). The United States Department of State has not recognized the Republic of New Afrika or its Provisional Government. Similarly, it has never granted immunity status to Lumumba. Thus, Lumumba is precluded from asserting sovereign immunity. *See United States v. James*, 528 F.2d 999, 1016 (5th Cir.), *reh. denied*, 532 F.2d 1054, *cert. denied*, 429 U.S. 959 (1976).

Even if by a stretch of the imagination one could assume the existence of such status, it was waived in this case. Lumumba, a member of the Michigan bar, freely chose to appear *pro hac vice* in the United States District Court to represent a criminal defendant. It would be anamolous to believe that he could participate in a trial as counsel, disrupt it by insulting a respected judge, and impede the trial process without subjecting himself to the district court's contempt procedures.

III

The more troublesome issue in this case concerns the district court's application of the summary contempt procedures *after* the trial had been completed and its failure to grant Lumumba a hearing. Judge Duffy purported to act pursuant to Fed. R. Crim. P. 42(a), which states in pertinent part: "A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." Clearly, therefore, Judge Duffy could have sentenced Lumumba on the spot if the circumstances warranted such immediate action. *Codispoti v. Pennsylvania*, 418

U.S. 506, 512-15 (1974). Yet, apparently he believed that such was unnecessary and, wishing to avoid the potential disruption of the trial and prejudice to the defendant that would have followed from Lumumba's immediate incarceration, postponed the ultimate disposition. *See Weiss v. Burr*, 484 F.2d 973, 982 n.15 (9th Cir. 1973), *cert. denied*, 414 U.S. 1161 (1974). We turn to consider the law of criminal contempt.

Blackstone has set forth the ancient law of contempt as it existed in the common law of England. Whether it was against the courts of justice involving violence, where the punishment was death, or whether it was merely using "threatening or reproachful words to any judge sitting in the courts," where the punishment was large fines and imprisonment, contempt constituted a disturbance of public justice. 4 W. Blackstone, *Commentaries* *124-26. The principle was early established in American jurisprudence that contempt, like all punishments, should be " 'the least possible power adequate to the end proposed.' " *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821).

Drawing on this combined common law history in an early case, the Supreme Court held up two rules for consideration. One states that a sentence pronounced without notice and an opportunity to be heard " 'is not entitled to respect in any other tribunal' "; the other holds that from time immemorial the authority of the tribunal must be upheld because upon its existence all other rights depend. *Ex Parte Terry*, 128 U.S. 289, 307 (1888) (quoting *Windsor v. McVeigh*, 93 U.S. 274, 277 (1876). Hence, contempts committed in the face of a court are to be instantly punished without proof or examination. *Id.* For those contempts committed at a distance where the court's knowledge is imperfect, there is no instant punish-

ment. But rather, an order to show cause should issue as to why contempt should not issue against the person charged. *Id. See Savin, Petitioner*, 131 U.S. 267 (1889). Thus, except for those contempts committed in the presence of the court, due process requires that the accused "be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation." *Cooke v. United States*, 267 U.S. 517, 537 (1925). To these two different situations two different rules applied. In the former, due process rights were sacrified for order in the court and the dignified maintenance of its processes; in the latter, where this interest need not be vindicated, the least possible power to accomplish the ends perceived consists of a show cause or other notice to the accused with a chance for him to be heard.

The circumstances in the instant case present a mixture of the two patterns. In this amalgam the contempt charged occurred in the face of the court, but the adjudication and punishment were deferred. The Supreme Court considered a somewhat similar situation in *Sacher v. United States*, 343 U.S. 1 (1952). In *Sacher* the Court concluded that the summary punishment power conferred by Rule 42(a) permits a trial judge, in his discretion, to defer its exercise until the trial's completion, without loss of his power to punish summarily. *Id.* at 11. Presumably, Judge Duffy relied on this view of his power. The government surely does in its brief on this appeal. Nonetheless, we conclude that such is not the present rule and that *Sacher* has limited vitality as precedent, even though it has not been expressly disavowed.

From the beginning it is evident that the Supreme Court had only permitted summary punishment as an immediate necessity to uphold a tribunal's authority. Where punishment is deferred until another day, the

reason for the exception that denied due process disappears. Thus, it comes as no surprise to see that the underpinnings of *Sacher* were quickly eroded. In *Offutt v. United States*, 348 U.S. 11, 14 (1954) the Court in setting aside a contempt conviction exercised its supervisory authority and directed that judges not sit in judgment themselves upon misconduct of counsel charged with contempt. At various times throughout this five month trial Lumumba shot arrows of insult at the trial judge; we assume that some of these arrows stung, leaving their barbs under the skin of even as experienced a trial judge as Judge Duffy. Failing to recognize that there could be some residue of aggravation on the judge's part would be unrealistically to hold that trial judges are not also human. Therefore, the rationale for not permitting judges to sit in judgment on themselves is that not only is justice to be done, but it is also to appear to be done. In 1968 the Supreme Court held in *Bloom v. Illinois*, 391 U.S. 194, that in light of its previous holdings the rule allowing criminal contempt to be constitutionally tried without a jury needed to be re-examined. It concluded that where the penalty exacted is serious (there, two years) right to trial by jury constitutionally attached. *Id.* at 210-11. Later, in *Mayberry v. Pennsylvania*, 400 U.S. 455, 463-64 (1971), a unanimous Court emphasizing due process requirements held that where the trial judge fails to act "the instant the contempt is committed, but waits until the end of the trial, on balance, it is generally wise where the marks of the unseemly conduct have left personal stings to ask a fellow judge to take his place." Since the state court judge failed to do so, the attorney's contempt conviction was reversed and the case remanded for trial before another judge.

Finally, we examine *Taylor v. Hayes*, 418 U.S. 488 (1974), which is nearly indistinguishable from the instant case. In that case a Kentucky trial judge held counsel for defendant—on trial for the murder of two police officers—in contempt on nine different occasions during the trial. On each occasion the judge told counsel that he was in contempt of court. At the conclusion of the trial, the judge imposed sentence for each contempt. When the lawyer attempted to speak, the trial judge refused to permit him to respond. The Supreme Court reversed and remanded the case to another trial judge. Where conviction and punishment are delayed, the Court noted that it is much more difficult to argue for preservation of the court's dignity. It went on to hold that "before an attorney is finally adjudicated in contempt and sentenced after trial for conduct during trial, he should have reasonable notice of the specific charges and opportunity to be heard in his own behalf." *Id.* at 498-99. *See also Codispoti v. Pennsylvania*, 418 U.S. at 515; *Groppi v. Leslie*, 404 U.S. 496, 502 (1972); Note, *Procedures for Trying Contempts in the Federal Courts*, 73 Harv. L. Rev. 353, 362-63 (1959).

Justice Rehnquist, for one, finds the holding in *Taylor* "squarely contrary to the holding in *Sacher*," *Codispati v. Pennsylvania*, 418 U.S. at 525 (Rehnquist, J., dissenting), and, while a factual distinction between the two cases does exist, we believe it lacks substance. In *Sacher*, unlike *Taylor*, the lawyers held in contempt were given an opportunity to speak and even though it came after sentence, the trial judge, it is said, could have modified his holding had the explanation proved persuasive. *See Groppi v. Leslie*, 404 U.S. at 506 n.11. Argument by way of defense and mitigation after sentence is akin to closing the barn door after the horse has escaped; it is a bit late. Regard-

less of that, here there was no opportunity for counsel to address the charges against him either before or after the adjudication of contempt by Judge Duffy. Further, whereas Judge Sweet did conduct hearings in connection with sentencing, he expressly disclaimed any authority to modify or even consider the conviction itself. Hence, on any view, the judgment of conviction must be reversed.

IV

Because we have determined that Lumumba is entitled to be heard on his allegedly contemptuous behavior and such involves reconsideration of his sentence as well, we need not reach the questions Lumumba raises as to whether he was in contempt and whether the penalty imposed was excessive.

The judgment of criminal contempt is reversed and the case remanded to the district court (Sweet, J.) for disposition upon notice and hearing, as set forth in Fed. R. Crim. P. 42(b). On remand, the district court need not hold a full-blown trial, but Lumumba should be allowed a reasonable opportunity to defend or explain his actions or present arguments in mitigation. *See Taylor v. Hayes*, 418 U.S. at 499.

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APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 747—August Term, 1985

(Argued January 27, 1986 Decided June 27, 1986)

Docket No. 85-1106

UNITED STATES OF AMERICA,

Appellee,

—v.—

CHOKWE LUMUMBA,

Appellant.

Before:

FRIENDLY,* OAKES, and WINTER,

Circuit Judges.

Attorney appeals from conviction by the United States District Court for the Southern District of New York,

* The case has been decided pursuant to § 0.14 of the Rules of the United States Court of Appeals for the Second Circuit. Subsequent to argument, Judge Friendly died. Prior to his death, however, he voted to affirm the judgment.

Robert W. Sweet, *Judge*, on two counts of criminal contempt for his conduct while representing one of the co-defendants in the "Brinks" trial. Held, failure to obey direct court order to sit down and insults directed at the court justified the contempt citations.

Affirmed.

HARRY A. DAVIS, Detroit, MI, Robert Dawkins, arguing pro hac vice, *for Appellant*.

PAUL E. SUMMIT, Assistant United States Attorney (Rudolph W. Giuliani, United States Attorney for the Southern District of New York, Stuart E. Abrams, Assistant United States Attorney, of counsel), *for Appellee*.

OAKES, *Circuit Judge*:

Not long ago we held that:

> To warrant a conviction in criminal contempt, the contemnor's conduct must constitute misbehavior which rises to the level of an obstruction of and an imminent threat to the administration of justice, and it must be accompanied by the intention on the part of the contemnor to obstruct, disrupt or interfere with the administration of justice.

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In re Williams, 509 F.2d 949, 960 (2d Cir. 1975) (citing *Eaton v. City of Tulsa*, 415 U.S. 697 (1974); *In re Little*, 404 U.S. 553 (1972)). Because we find that the appellant's conduct rose to this level of misbehavior, we affirm the judgment of the district court.

This appeal presents the question whether appellant, Chokwe Lumumba, Esq., was properly held in criminal contempt on two counts. The first contempt citation occurred during the jury voir dire of a lengthy criminal trial in which Lumumba represented one of the codefendants when Lumumba, in the presence of a venireman, declined to obey an order of the court to "be quiet and sit down." The second occurred during the course of the trial and was issued after a number of remarks that, to say the least, were disrespectful of the judge, if not downright insulting to him. With regard to each count, the trial judge, Kevin Thomas Duffy, cited Lumumba at the time the conduct occurred, but final adjudication and sentencing was deferred until after the trial's conclusion. At that time, pursuant to Fed. R. Crim. P. 42(a) and 18 U.S.C. § 401 (1982), Judge Duffy summarily adjudicated Lumumba in criminal contempt and referred the matter to the Assignment Committee pursuant to Rule 18 of the Rules for the Division of Business Among Southern District Court Judges for transfer to another judge for sentencing. *United States v. Shakur*, 570 F. Supp. 336 (S.D.N.Y. 1983).

After denying various motions brought by Lumumba, *United States v. Lumumba*, 578 F. Supp. 100 (S.D.N.Y. 1983), Judge Robert W. Sweet sentenced Lumumba to three years' probation with the condition that he perform 350 hours of community service during the first fifteen months of the probationary term. On appeal, this court

reversed and remanded. 741 F.2d 12 (2d Cir. 1984). We held that where a lawyer is cited for criminal contempt during trial, but adjudication and punishment are deferred until after trial, he is entitled to notice and a hearing pursuant to Fed. R. Crim. P. 42(b), although not necessarily a "full-blown" trial, before a judge other than the trial judge. *Id.* at 17.

On remand, Judge Sweet held that formal notice of the charges was unnecessary since Lumumba had actual notice, that Lumumba was not entitled to a jury trial, and that Lumumba could address the appropriateness of his own conduct, but not the alleged bias of the presiding judge. 598 F. Supp. 209 (S.D.N.Y. 1984). In accordance with the directions of this court, 741 F.2d at 17, Lumumba was given "a reasonable opportunity to defend or explain his actions or present arguments in mitigation" in a hearing before Judge Sweet. 603 F. Supp. 913, 914 (S.D.N.Y. 1985). Lumumba was again convicted of criminal contempt on both counts and received the same sentence as before, except the community service is to be performed during the first eighteen months of the probationary term.

The criminal trial at which Lumumba made the comments that are at issue here concerned the so-called Brinks armored-car robbery at Nanuet, New York, and ran from April 4 to September 3, 1983. Lumumba's client, Bilal Sunni-Ali, was acquitted, although four of the five co-defendants with whom he was tried were convicted as accessories after the fact to armed robbery or of participation in a racketeering enterprise that involved a series of armored truck robberies, two murders, and the prison escape of Black Liberation Army leader Joanne Chesimard, *see generally United States v. Ferguson*, 758 F.2d

843 (2d Cir.), *cert. denied*, 106 S. Ct. 124 (1985). We agree with Judge Duffy that "Mr. Lumumba . . . demonstrated from the start of the trial his conscious desire to obstruct and disrupt the orderly trial of the six defendants on trial. . . . not [as] part and parcel of a vigorous defense of his client but instead [intentionally] to cause significant disruption of the proceedings." *Shakur*, 570 F. Supp. at 337.

Preliminarily, we note that it is useful for analytical purposes to divide the forms of misconduct in the courtroom by attorneys that are punishable by contempt into three general categories—(1) refusal to obey a proper court order or proper court procedures; (2) disrespectful remarks to the court, opposing counsel, or other parties; and (3) excessive or repetitive argumentation or other willful delay of the proceedings. The first contempt charge here falls into the first category since it involves disregard of court orders and the second contempt charge falls into the second category because it concerns disrespectful remarks.

We have little difficulty with the first contempt citation. During the jury voir dire in the mid-morning of April 13, 1983, Lumumba first appeared as co-counsel, with Lynne F. Stewart, Esq., on behalf of defendant Sunni-Ali. Shortly thereafter he orally moved to strike the entire jury panel, a motion which had just been denied when made by another attorney. The motion was denied and the court advised Lumumba to put the motion in writing, a procedure to which the court had required all defense counsel to adhere, and stated that the written motion would be made a part of the record. Lumumba persisted in his attempt to make his motion orally, and when the judge attempted to move on to the peremptory

challenges Lumumba first accused him of unwillingness to hear the defendant's contentions and then stated that "we think perhaps you will continue to taint, to pollute the jury." When the court excused a black prospective juror who stated that she could not decide the case fairly and impartially solely on the evidence given in court, Lumumba contended that the judge's action was precipitous and accused him of being inconsistent in his treatment of white and black veniremen. When the court noted that Lumumba had not been present for earlier voir dire and ordered him to "sit down," Lumumba refused, stating, "That's the way you give dogs and children instructions," and insisted he had other "appropriate" motions to make. Finally, later in the day, when, in accordance with the customary practice in the Southern District, the judge was questioning a prospective juror, Lumumba interrupted and attempted to continue to argue matters upon which the court had already ruled. After Lumumba again ignored several orders of the court to "be quiet and sit down," and repeated his charge that the court was unwilling to listen to the defendant's contentions, Judge Duffy excused the venireman from the courtroom and held Lumumba in criminal contempt. The exchange leading to the contempt citation is set out in the margin.[1]

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1. THE COURT: Could you tell us what county you come from?
JUROR NO. 9: Manhattan.
MR. LUMUMBA: Excuse me, judge.
THE COURT: Manhattan?
JUROR NO. 9: Yes.
MR. LUMUMBA: Judge, we have to deal—
THE COURT: Mr. Lumumba, this is a court order, Mr. Lumumba, that I am making right now for you to be quiet and sit down.
MR. LUMUMBA: Well, judge, I'm pointing out—
THE COURT: If you disobey that order—
MR. LUMUMBA: Are you trying to put me under an order so you don't have to deal with me?

While a lawyer has the right and duty to argue vigorously all points that he believes are properly advanced on behalf of his client, he must obey a direct order of the court, such as an order to cease argument, no matter how arbitrary he may believe it to be. *Maness v. Meyers*, 419 U.S. 449, 458-60 (1975); *In re Weiss*, 703 F.2d 653, 660 (2d Cir. 1983). Justice Jackson stated the law with his typical clarity and succinctness in *Sacher v. United States*, 343 U.S. 1, 9 (1952):

> Of course, it is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court's considered ruling. Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial

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THE COURT: Are you going to obey that order?

MR. LUMUMBA: Are you trying to hide an issue from this juror?

THE COURT: No. I am issuing an order for you to be quiet and sit down.

Are you going to obey it or not?

MR. LUMUMBA: You won't listen to us when the juror isn't here, perhaps you'll listen now.

THE COURT: Are you going to obey it or not?

MR. LUMUMBA: Judge, the question I am asking you—

THE COURT: Are you going to obey it or not, yes or no?

MR. LUMUMBA: There is a matter to be heard. You just heard two jurors—

THE COURT: I am telling you now to sit down and be quiet.

MR. LUMUMBA: The fact that they are—

THE COURT: Take the juror out, Mr. Clerk.

(Juror number nine excused from the courtroom)

THE COURT: Mr. Marshal—

MS. TIPOGRAPH: I have to object to the manner in which you are treating co-counsel in this issue.

THE COURT: I'm sorry.

MR. SUNNI-ALI: I have to object to the way you are treating my lawyer in this instance and continuously since this incident started.

THE COURT: Mr. Lumumba is held in criminal contempt.

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> courts. But if the ruling is adverse, it is not counsel's right to resist it or to insult the judge—his right is only respectfully to preserve his point for appeal. During a trial, lawyers must speak, each in his own time and within his allowed time, and with relevance and moderation. These are such obvious matters that we should not remind the bar of them were it not for the misconceptions manifest in this case.

Lumumba was not held in contempt for an "earnest request for voir dire," as he claims in his brief. Rather, he was held in contempt only after he had been repeatedly ordered to sit down and stop rearguing objections upon which the court had already ruled. His direct disobedience of a court order threatened to delay the proceedings, to interfere with jury selection, and, occurring as it did on the first day of his presence in the courtroom, to disrupt the orderly proceeding of the trial. As the Seventh Circuit explained in the "Chicago Seven" conspiracy case, "failure to heed the directive of the court to desist from arguing, to sit down, or to remain quiet may indeed constitute an actual material obstruction to the administration of justice." *United States v. Seale*, 461 F.2d 345, 371 (7th Cir. 1972). Any other result would create chaos in the courtroom; while surely "[a] certain amount of leeway must be allowed," *id.*, when the directive is clear and counsel understands it, he must obey even if he feels his obedience may risk prejudicing his client's substantive case. Perhaps Lumumba felt it important to establish his defiance of the court and of the judicial system on his very first day in court. At the same time, it was important for the judge to set the pace and tone of the trial and Lumumba, by ignoring a repeated explicit order of the court, clearly obstructed the progress of the voir dire.

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EDITOR'S NOTE

PAGES 4449 thru 4460 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

The second contempt citation is of a different nature, as it concerns disrespectful remarks rather than disobedience of a court order. While such remarks or insults should be discouraged so as to preserve a rational thought process in the courtroom, *see Disorder in the Court* at 149, it is sometimes difficult to draw a line between a comment that is merely disrespectful and one that should be punished as contemptuous for obstructing and imminently threatening the administration of justice under *In re Williams*, 509 F.2d at 960. *See also Seale*, 461 F.2d at 369-70 (improper for a court to slide easily from a finding of disrespect to one of subverting and preventing justice). The Court in *Little*, 404 U.S. 553, also warned against trial judges' confusing offenses to their sensibilities with obstruction of the administration of justice. *Id.* at 555. Although courts cannot uphold the contempt if the cited conduct is not contumacious but other uncited conduct is or has been, *Eaton*, 415 U.S. at 698-99, a court can nevertheless look at the cited conduct in the context of other closely related behavior in the case to determine if that conduct is in fact contumacious. *See United States v. Martin-Trigona*, 759 F.2d 1017, 1025-26 (2d Cir. 1985); *In re Dellinger*, 461 F.2d 389, 401 (7th Cir. 1972); *Seale*, 461 F.2d at 371.

While a written record, even when supplemented, as here, by comments of the trial judge,[2] of course cannot convey the tone of remarks and the physical action or body language accompanying them, nevertheless the appellate court can get the flavor of the trial proceedings

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2. Judge Duffy stated: "The cold record cannot convey the total disrespect shown by Mr. Lumumba's mocking, condescending actions and the querulous, acidic, baiting tone of voice used by him in addressing the court." *Shakur*, 570 F. Supp. at 348.

from an extended reading of the transcript, which we have done.

The specific conduct which prompted the second citation occurred on June 8, 1983, during the making of an offer of proof at the court's behest outside the presence of the jury or a witness. The offer of proof concerned the alleged FBI attempt to destroy the Black Liberation movement and kill people in it, a matter the court had previously ruled as not relevant. The specific remarks Lumumba uttered were "[a]nother point is I would like some kind of ruling on why you won't let me do what you let them do and then have the audacity to sit on the bench and claim you are fair."[3]

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3. The entire offer of proof was as follows:

> [Question by Mr. Lumumba]: You have had an opportunity, and this is the point I am trying to get at, in your work with the FBI, you have seen a lot of documents which relate to the black movement, isn't that right? You have seen a lot of them, right?
>
> MR. LITT: Objection.
>
> THE COURT: Sustained.
>
> MR. LUMUMBA: Judge, I would like an offer of proof on this. I think this is very relevant, especially for this document.
>
> THE COURT: We will do it outside the presence of the jury.
>
> MR. LUMUMBA: We can do it outside.
>
> THE COURT: Okay, fine. Ladies and gentlemen, it's time for a break. Just leave that exhibit where it is, okay?
>
> (Jury not present)
>
> MR. LUMUMBA: Okay, can I ask this question as an offer of proof? The jury is not around, Judge. You don't have to worry about the jury finding out how the FBI treated the black liberation movement.
>
> THE COURT: If that's what we are getting into, it has no place in this trial.
>
> MR. LUMUMBA: Why has it no place in this trial? You are here prosecuting the black liberation movement. It has nothing to do with the way your government treated us in the past, right? It's insane.
>
> THE COURT: Tell me what you are attempting to prove.

While a single isolated remark " 'must constitute an imminent, not merely a likely, threat to the administration of justice' " to be punishable as contemptuous, *see Eaton*, 415 U.S. at 698 (quoting *Craig v. Harvey*, 331 U.S. 367, 376 (1947), seen in the light of Lumumba's prior courtroom conduct, his remark amply justifies a

BY MR. LUMUMBA:

Q. Have you—

THE COURT: Step [d]own, Mr. Spriggle, and step outside. Tell me what you are trying to prove.

MR. LUMUMBA: Fine. Let him go. Wait until he leaves. I don't want him to hear it anyway because he will probably lie.

(Witness left the courtroom)

MR. LUMUMBA: The thing is that it is my belief that the document which is being entered into evidence, which you accepted into evidence for whatever reason, it doesn't talk about Brinks robberies or anything else, is a document which is totally consistent with documents which have pervaded the black liberation struggle since the time that the FBI has started killing different people in the movement, since the time that there was a manifest need for security, since the time that the black liberation movement has been pa[t]roling in communities trying to stop crime and therefore have had necessity for rules of this nature.

That being the case, I would like to point out through the specific document which you have suggested cannot come into evidence, which is almost identical in parts to this document, and through his knowledge of the documents which he may have examined, having been a person who has been in the FBI for 26 years during the period of time in which they have examined the whole files, the total files of various different movements, he can tell us that the principles in this document are not inconsistent with many of those other principles which come from groups which clearly had nothing to do with robbing Brinks trucks and were totally overground political formations which were functioning in a way which was legal even by corrupt laws of the United States.

So the point that I am trying to make here is this, that if they are allowed to issue a document which has prejudicial impact if not explained, then I have a right to go into it and to explain it through this witness. That's one point.

Another point is I would like some kind of ruling on why you won't let me do what you let them do and then have the audacity to sit on the bench and claim you are fair.

THE COURT: Look Mr. Lumumba, you have been held in contempt more than once and you are held in contempt again.

finding of criminal contempt. In Judge Duffy's recited findings of contempt of September 6, 1983, as amended September 7, he quoted from the transcript other prior examples of Lumumba's conduct which support the inference that he was making a calculated insult to the judge. *Shakur*, 570 F. Supp. at 342-46. During the course of the trial Lumumba made the following comments to the court: "You're not concerned about whether he's telling the truth"; the judge had "granted every objection they made and overruled every one we made. Are you trying to be fair about this?"; "They don't need another prosecutor, Judge"; "Judge, is it possible that you could testify as the witness?"; "You haven't been fair at this point, why should we take it that you are trying to be fair now. This kind of silly sobbing, patronizing, condescending appeal to the press is ridiculous. There is no way in the world you have been fair"; "Anything that's come out of this trial has been a response to the ridiculous way that you have been trying to chill people since you first got here, but I will continue to represent this man." Judge Duffy also noted the following exchange:

> MR. LUMUMBA: Why are you sustaining that objection, Judge? I thought I could inquire.
>
> THE COURT: Why don't you look it up in the books?
>
> MR. LUMUMBA: Well, which books were you referring to? Not the ones I have read. I probably finished higher in my law school than you did and they don't deal with that.

(Tr. 2281.)

> MR. LUMUMBA [out of the presence of the jury]: Did they tell you that you had to tell the truth?

MR. LITT [the Government prosecutor]: Your Honor, among other things, could you ask Mr. Lumumba not to sit in the jury box while he asks questions?

THE COURT: Get out of there. Come on. Look, Mr. Lumumba, it doesn't bother me in the slightest bit, but your disrespect for this court is absolutely incredible.

MR. LUMUMBA: Well, Judge your disrespect for Black people is—

THE COURT: No, no. Get up and get back to where you were.

MR. LUMUMBA: You have been performing like an outstanding bigot.

THE COURT: Not in the slightest bit.

MR. LUMUMBA: That's what all bigots say.

THE COURT: Get out of the jury box.

MR. LUMUMBA: You have this little puppet on a string up on the stand and you don't want him asked questions no matter what the questions are and then you have the audacity to—

(Tr. 2283-84.) Finally, on June 8, 1983, just prior to his cited remarks, Lumumba called the judge "a disgusting bigoted partial joke."

Our search of the transcript reveals a few other examples of Mr. Lumumba's conduct, occurring prior to the second contempt citation:

THE COURT: Mr. Lumumba—

MR. LUMUMBA: When I get finished you can talk. When I get finished making my record.

THE COURT: I will talk when I want to, Mr. Lumumba.

. . . .

THE COURT: I will tell you what, Mr. Lumumba. You are just trying to bait me, and apparently you get some kind of pleasure out of that. But I don't really care.

MR. LUMUMBA: I am trying to squeeze some justice out of you. I am trying to squeeze some justice out of you. If you will just give a little bit of justice.

(Tr. 1477-78.)

MR. LUMUMBA: Can you explain the basis for that ruling for us, please?

THE COURT: No.

MR. LUMUMBA: You don't have a basis or you are just acting as if you don't know what we are talking about? Which one is it?

THE COURT: You are a graduate of law school, You look it up.

(Tr. 1616.)

THE COURT: Mr. Lumumba, please, be good enough to sit down and be quiet.

MR. LUMUMBA: The other point is that you talk about hearsay. You allow hearsay in, presumably, under some type of connection with conspiracy that has not been established yet and those things, I think, were inappropriate and we would look for a better performance from the court in the future.

(Tr. 1619.)

MR. LUMUMBA: In addition to that, I would object to the questions that the court asked. I think that the U.S. Attorney has enough people at the table

to do their job. You don't have to help them, so those are the objections I would raise. Showing bias.

(Tr. 1~25-26.)

MR. LUMUMBA: I object.

THE COURT: I don't care whether you object or not.

MR. LUMUMBA: I know you don't. You don't care about anything we do.

THE COURT: Sit down.

MR. LUMUMBA: Don't tell me to sit down. I haven't finished yet. I am telling you that we have [a] right to have argument on the matter.

THE COURT: Argument on what matter?

MR. LUMUMBA: You can't summarily excuse a juror without some argument.

THE COURT: Why not? Would you want to tell me how I can keep the juror here who is not going to get paid for four or five months?

(Tr. 1977.)

MR. LUMUMBA: I am just saying that if the people who are sitting out in the audience are laughing in this court, it may not be because we are doing anything that is a sham; they might suspect that the court's pretense to be objective—

THE COURT: Are we going through this nonsense again? I don't have to sit and listen to this nonsense any more. This is silliness.

(Tr. 2192.)

MR. LUMUMBA [to an informant witness]: Mr. Rison, you got a friend there in the judge. You feel pretty secure about that?

MR. LITT: Objection, your Honor.

THE COURT: That is the end of that. Mr. Stern, do you have any questions?

MR. LUMUMBA: I am not finished, Judge.

THE COURT: You keep it up and you will be finished.

MR. LUMUMBA: I am not finished yet. If you want to deprive my client of his hearing, you can do that. See—

THE COURT: I am not depriving your client of his hearing; I am depriving the audience of your showmanship. Why don't you back up where you belong? Don't get close to the witness.

MR. LUMUMBA: Are you nervous? Are you bothered?

THE COURT: You are not making me nervous.

MR. LUMUMBA: It should be all right.

THE COURT: Get back there.

MR. LUMUMBA: I thought you said when you were a lawyer, you walked around the courtroom everywhere.

THE COURT: Yes, I did, but I never came that close to a witness. Get back at the podium.

MR. LUMUMBA: No.

(Tr. 2263-64.)

[Question by Mr. Lumumba:] When was the last time you had used drugs before that day?

MR. LITT: Objection.

THE COURT: Sustained.

MR. LUMUMBA: Have you used any today?

MR. LITT: Objection.

THE COURT: Sustained.

MR. LUMUMBA: You want to hear from a witness

and you don't even know whether he's on drugs, is that right?

MR. LITT: Objection.

MR. LUMUMBA: Is that your objective here?

THE COURT: Next question.

MR. LUMUMBA: You don't want to know whether the witness has been using drugs before he testified before you?

THE COURT: Next question.

MR. LUMUMBA: I want an answer to my question. That's the question to you.

THE COURT: Are you going to continue or are [you] going to be finished?

MR. LUMUMBA: I'm not finished. If you want to cut off my hearing, if you want to deprive my client of his hearing that's on you.

THE COURT: I'm not depriving your client of a hearing. You will be depriving your client.

MR. LUMUMBA: I'm not depriving my client of a hearing.

THE COURT: Look, counselor, I am he[re] to run a courtroom, not a classroom.

MR. LUMUMBA: When are you going to start running it?

(Tr. 2298-99.)

[Question by Mr. Lumumba:] So how much money is the FBI paying you for your testimony?

THE COURT: Sustained.

MR. LITT: Objection.

MR. LUMUMBA: Judge, you are very versatile. You make objections and sustain them.

THE COURT: Yes. Come on.

MR. LUMUMBA: But you only seem to work on

one side, the prosecution. You don't work well on the defense side. What's the problem?

THE COURT: Come on. Do you have a question to ask?

MR. LUMUMBA: Well, have you received any money prior to coming here today for your testimony?

MR. LITT: Objection.

THE COURT: Sustained.

MR. LUMUMBA: What's wrong with that question, huh?

THE COURT: Next question.

MR. LUMUMBA: You're so smart, you can explain it, I know you can, come on. It's not relevant to you whether the witness don't know whether he's getting paid for the testimony.

THE COURT: Next question. Come on now.

(Tr. 2314-15.)

MR. LUMUMBA: I don't know what you think you are doing. You are trying to intimidate people. I am here trying a case where a man's life is at stake. You don't have enough little threats and intimidations to discourage me.

THE COURT: No threats or intimidations. I want to tell you something. My father used to tell me that you don't reprimand the village idiot when he is looking for attention.

(Tr. 2391.)

Lumumba concedes that the remarks for which he was ultimately held in contempt were not provoked by the judge's comments quoted above: "You look it up," and "Why don't you look it up in the books," or by his

reference to "the village idiot," which Lumumba claims was a direct reference to him but which the court denied referred to Lumumba. The remarks indicate judicial annoyance with Lumumba, and the use of the term "village idiot" was unfortunate, even if, as Judge Duffy stated, he did not actually call Lumumba the village idiot. All three remarks, however, occurred more than five weeks before Lumumba's cited conduct, and thus that conduct can hardly be explained as provoked by the trial judge. Moreover, while it may be considered in extenuation of the offense and in mitigation of any penalty imposed, "impropriety on the part of the trial judge cannot justify or excuse contemptuous conduct." *Dellinger*, 461 F.2d at 401. *See also Seale*, 461 F.2d at 362; *United States v. Offutt*, 145 F. Supp. 111, 114-115 (D.D.C. 1956), *aff'd as modified*, 247 F.2d 88 (D.C. Cir.), *cert. denied*, 355 U.S. 856 (1957); *cf. Sacher*, 343 U.S. at 39 (Frankfurter, J., dissenting). Because Lumumba's cited conduct, in the context of his numerous insults and his judge-baiting, disrupted the orderly administration of the trial, and because he clearly intended such (whether or not as part of a "political" trial strategy), the second citation is affirmed.

Lumumba argues that the admission of the transcript of the trial into evidence in his contempt hearing before Judge Sweet was error. This evidence was admitted under Fed. R. Evid. 902(4) as a certified copy of a public record. It is as such "prima facie a correct statement" of the testimony. 28 U.S.C. § 753(b) (1982). Lumumba offers nothing to rebut this presumption.

Lumumba also claims that the decision below should be reversed because Judge Sweet denied Lumumba's motion to call Judge Duffy and the Assistant United

States Attorneys who represented the Government at the trial as witnesses at his hearing. Judge Sweet's action, however, was proper. Lumumba was entitled not to a "full-blown trial," but only to "a reasonable opportunity to defend or explain his actions or present arguments in mitigation." *Lumumba*, 741 F.2d at 17. *See Taylor v. Hayes*, 418 U.S. 488, 499 (1974); *Offutt v. United States*, 232 F.2d 69, 72 (D.C. Cir.), *cert. denied*, 351 U.S. 988 (1956).

In addition, Lumumba asserts that Judge Sweet violated this court's prior ruling by acknowledging that he could not disregard entirely Judge Duffy's findings of contempt. Judge Sweet had the candor to say, perhaps inadvisedly, "[w]ere I to state that I have totally disregarded Judge Duffy's conclusions, such a statement would not be credible. I have, however, sought to view the issue as best I can solely from the written record and the testimony presented to me." 603 F. Supp. at 919. We agree with the Government that the comment is commendable for its candor and, as we read Judge Sweet's opinion, even while he was criticizing the previous opinion of this court ("I continue to believe that this remand was not necessary," *id.* at 920), he nevertheless made independent findings as to both citations of contempt and thus he acted in compliance with this court's earlier decision.

Judgment affirmed.

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APPENDIX C
TAYLORS PROGENY

	PART I	PART II	PART III	PART IV
	ACTUAL PRESENCE NO EMBROIL-MENT IMMEDIATE ADJUDICATION	ACTUAL PRESENCE NO EMBROIL-MENT DELAYED ADJUDICATION	ACTUAL PRESENCE EMBROILMENT IMMEDIATE ADJUDICATION	ACTUAL PRESENCE EMBROILMENT DELAYED ADJUDICATION
SAME JUDGE ALLOCUTION	MARTIN-TRIGONA (2d) U.S. v. BRANNON (5th) U.S. v. LOWERY		STATE v. CAMPBELL (Sup. Ct. Maine)	
SAME JUDGE EVIDENTIARY HEARING		SS REISS (6th) U.S. v. MOSCHIANO (7th)		
NEW JUDGE ALLOCUTION			SANDSTROM v. BUTTERWORTH (11th)	U.S. v. LUMUMBA (2d)
NEW JUDGE EVIDENTIARY HEARING	U.S. v. FLYNT	O'BRIENT v. O'BRIENT (North Carolina Sup. Ct.)	SANDSTROM v. BUTTERWORTH (11th)	U.S. STRATTON (2d)
NEW JUDGE EVIDENTIARY HEARING JURY		U.S. v. STRATTON (2d)	U.S. v. STRATTON (2d)	U.S. v. STRATTON

APPENDIX D
SUGGESTED SOLUTION

	ACTUAL PRESENCE NO EMBROIL-MENT IMMEDIATE ADJUDICATION	ACTUAL PRESENCE NO EMBROIL-MENT DELAYED ADJUDICATION	ACTUAL PRESENCE EMBROILMENT IMMEDIATE ADJUDICATION	ACTUAL PRESENCE EMBROILMENT DELAYED ADJUDICATION
SAME JUDGE ALLOCUTION			STATE v. CAMPBELL (Sup. Ct. Maine)	
SAME JUDGE EVIDENTIARY HEARING				
NEW JUDGE EVIDENTIARY HEARING				
NEW JUDGE EVIDENTIARY HEARING JURY				